International Islamic University Malaysia v Mohd Adnan Adrian Paul Holden Abdullah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04(IM)-26–02 OF 2014
ABDUL WAHAB PATAIL, AZAHAR MOHAMED, MOHTARUDIN BAKI JJCA
25 MARCH 2015

Civil Procedure — Judgments and orders — Judgment in default — Judgment in default recorded against respondent in sessions court — Application to set aside judgment in default — Whether respondent received summons and statement of claim — Whether judgment entered prior to respondent's knowledge — Whether proper procedures complied with before judgment was recorded

A judgment in default ('JID') was recorded against the respondent in the sessions court. The respondent filed to set aside the said JID on the grounds that the summons and statement of claim had never been served to the respondent; and that the judgment was irregular. The sessions court judge heard and dismissed the respondent's application. The respondent appealed to the High Court. The appeal was allowed with cost and the JID was set aside. The appellant appealed to this court on the grounds that the respondent had not received the summons and statement of claim thus the judgment was entered without his prior knowledge; and the appellant failed to comply with the proper procedures when recording the judgment.

Held, allowing the appeal; setting aside order of the High Court with costs of RM10,000:

(1) There is a distinction between the affidavit of merits to support an application to set aside a JID and an affidavit opposing an application for summary judgment. In the latter, it must demonstrate that there are triable issues, being issues, whether of law or fact but which relies on a foundation of facts that is disputed and the determination of those disputed facts require testing of oral evidence, or other evidence requires oral explanation in a trial (see para 7).

(2) Where the object of an application is to set aside a JID, the affidavits of merits need to demonstrate that the JID results in an injustice on the merits even if the defendant had failed in compliance with the procedural requirements. There must, therefore, be an affidavit of merits to provide the foundation upon which a finding may be made that there is an issue,

whether of fact or law or both, upon which the applicant ought to be heard for a fair and just decision and therefore the JID ought to be set aside (see para 7).

(3) There was no statement of defence in the first place. A statement of defence might show what the issue was that needed to be heard. Although the claim was filed in 2011, the respondent had also failed to file a proposed statement in defence. Instead, the respondent's affidavit was only to assert that he had no knowledge of the summons and statement of claim. In brief, the respondent addressed the merits by way of his written submission without establishing a foundation by an affidavit of merits as to why, for the fair and just disposal of the case that the JID be set aside and he be allowed to defend. Since there was no foundation laid, there was no basis for the High Court to intervene and to set aside the JID otherwise regularly obtained. The judgment in default was restored (see paras 9–10).

[Bahasa Malaysia summary

Penghakiman ingkar ('PI') direkodkan terhadap responden di mahkamah sesyen. Responden memfailkan untuk mengetepikan PI tersebut atas alasan bahawa saman dan pernyataan tuntutan tidak pernah diserahkan kepada responden; dan bahawa penghakiman adalah luar aturan. Hakim mahkamah sesyen mendengar dan menolak permohonan responden. Responden merayu kepada Mahkamah Tinggi. Rayuan dibenarkan dengan kos dan PI diketepikan. Perayu merayu kepada mahkamah ini atas alasan bahawa responden tidak menerima saman dan pernyataan tuntutan dengan itu penghakiman dimasukkan tanpa pengetahuan terdahulu; dan perayu gagal untuk mematuhi dengan prosedur betul apabila merekodkan penghakiman.

Diputuskan, membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi dengan kos sebanyak RM10,000:

(1) Terdapat perbezaan di antara afidavit merit untuk menyokong permohonan untuk mengetepikan PI dan afidavit membantah permohonan untuk penghakiman ringkas. Di dalam afidavit membantah ia mesti menunjukkan, bahawa terdapat isu-isu yang boleh dibicarakan, sebagai isu-isu, sama ada undang-undang atau fakta tetapi yang bergantung atas asas fakta yang dipertikaikan dan penentuan fakta yang dipertikaikan tersebut memerlukan ujian keterangan lisan, atau keterangan lain memerlukan penjelasan lisan dalam perbicaraan (lihat perenggan 7).

(2) Di mana objek permohonan adalah untuk mengetepikan PI, afidavit merit perlu menunjukkan bahawa PI menyebabkan ketidakadilan atas merit walaupun defendan gagal dalam pematuhan dengan keperluan prosedur. Mesti terdapat, oleh itu, afidavit merit untuk

memperuntukkan asas di mana dapatan mungkin dibuat bahawa terdapat isu, sama ada fakta atau undang-undang atau kedua-duanya, di mana pemohon patut didengar untuk keputusan yang adil dan saksama dan oleh itu PI patut diketepikan (lihat perenggan 7).

(3) Dari mula tidak terdapat pernyataan pembelaan. Pernyataan pembelaan mungkin menunjukkan isu apakah yang diperlukan untuk didengar. Walaupun tuntutan difailkan pada tahun 2011, responden juga gagal untuk memfailkan pernyataan pembelaan yang dicadangkan. Sebaliknya afidavit responden hanya menegaskan bahawa dia tidak mempunyai pengetahuan mengenai saman dan pernyataan tuntutan. Secara ringkasnya responden menangani merit melalui penghujahan bertulisnya tanpa membuktikan asas oleh afidavit merit terhadap mengapa untuk perlepasan adil dan saksama kes bahawa PI diketepikan dan dia dibenarkan untuk membela. Memandangkan tidak terdapat asas yang dikemukakan, tidak terdapat asas untuk Mahkamah Tinggi untuk campur tangan dan untuk mengetepikan PI atau sebaliknya secara tetap diperolehi. Penghakiman ingkar diperbetulkan (lihat perenggan 9–10).]]

Notes

For cases on judgment in default, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5319–5352.

Cases referred to

Buga Singh v Koh Bon Keo [1967] 1 MLJ 16; [1966] 1 LNS 22 (refd)
Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312; [1994] 1 CLJ 328, SC (refd)
Hayman v Rowlands [1957] 1 All ER 321, CA (refd)
Lembaga Kumpulan Wang Simpanan Pekerja v Agni Energie Sdn Bhd & Ors [2014] 8 MLJ 565, HC (refd)
Majlis Amanah Rakyat v Ismail bin Maskor & Ors [2006] 3 MLJ 281, HC (refd)
Muhammad Sanusi Md Nor lwn Sobri Sudin [2014] 1 LNS 91, HC (refd)
PL Construction Sdn Bhd v Abdullah bin Said [1989] 1 MLJ 60; [1988] 2 CLJ 808, HC (refd)
Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67; [2003] 6 CLJ 326, HC (refd)
Perwira Affin Merchant Bank Bhd v Dato' Soh Chee Wen [2000] 3 MLJ 555, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 72

Appeal from: Appeal No 12A-118–03 of 2013 (High Court, Kuala Lumpur)

Nor Hafeez Nurul Hadi (Harez Fitri with her) (Khalek Awang & Assoc) for the appellant.
Osman bin Ujang (Ahmad Fauzan bin Abdul Aziz with him) (Osman Ujang & Co) for the respondent.

Abdul Wahab Patail JCA:

THE BRIEF FACTS

[1] A judgment in default was recorded against Mohd Adnan Adrian Paul Holden Abdullah, ('the respondent') who was the defendant in the sessions court on 10 January 2012. The respondent filed by notice an application to set aside the said judgment in default on 24 December 2012 citing two reasons:

(a) that the summons and statement of claim had never been served to the respondent/defendant; and

(b) that the judgment was irregular.

[2] The sessions court judge heard and dismissed the respondent's application. The respondent appealed to the High Court. The appeal was allowed with cost and the judgment in default was set aside.

[3] The appellant, who was the plaintiff in the sessions court and respondent in the High Court appealed to this court.

THE DEFENCES

[4] The respondent's defence on merits provided in the notice were as follows:

(a) the respondent had not received the summons and statement of claim thus the judgment was entered without his prior knowledge; and

(b) the appellant failed to comply with the proper procedures when recording the judgment.

[5] In *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312; [1994] 1 CLJ 328, it has been held that even if the judgment is regular, it may be set aside on the ground the defendant against whom the judgment was obtained had a good defence or merits. The principle is that the judgment must be fair and just on the merits and not on the basis of a knockout on a technicality. Thus, if the judgment is otherwise regular, the rule is that there must be an affidavit of merits in support of the application to set aside the judgment in default (see *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67;

[2003] 6 CLJ 326; *Majlis Amanah Rakyat v Ismail bin Maskor & Ors* [2006] 3 MLJ 281; and *Lembaga Kumpulan Wang Simpanan Pekerja v Agni Energie Sdn Bhd & Ors* [2014] 8 MLJ 565). It is necessary only to show there is at least an issue which should go on trial (see *PL Construction Sdn Bhd v Abdullah bin Said* [1989] 1 MLJ 60; [1988] 2 CLJ 808). The strength or weakness of the issue does not matter for it is the trial that determines whether it succeeds or not (see *Hayman v Rowlands* [1957] 1 All ER 321 and *Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16; [1966] 1 LNS 22. But it does not make it unnecessary to have an affidavit of merits.

[6] The case of *Perwira Affin Merchant Bank Bhd v Dato' Soh Chee Wen* [2000] 3 MLJ 555 was cited before this court. There it was held: '... the court has to be satisfied on the affidavit evidence that the defence has not only raised issue, but also that the said issue is triable. The determination of whether or not an issue is triable depends on the facts arising from each case as disclosed in the affidavit evidence before the court. There must be sufficient facts disclosed on the affidavit evidence to show there is substance to the assertions, a final determination upon which is best made after the discovery, interrogatories, and or examination of witness as the parties think fit, in a trial ... A triable issue is an assertion that not only has been raised and is denied or disputed, but is one upon which there is some evidence that is not equivocal or lacking in precision, or is not consistent with undisputed contemporary documents or other statements by the same deponent, or is not inherently improbable in itself, to support it'.

[7] For the removal of doubt, we hasten to clarify that there is a distinction between the affidavit of merits to support an application to set aside a judgment in default and an affidavit opposing an application for summary judgment. In the latter, it must demonstrate that there are triable issues, being issues, whether of law or fact but which relies on a foundation of facts that is disputed and the determination of those disputed facts require testing of oral evidence, or other evidence requires oral explanation in a trial. But where the object of an application is to set aside a judgment in default, the affidavits of merits need demonstrate that the judgment in default results in an injustice on the merits even if the defendant had failed in compliance with the procedural requirements. There must, therefore, be an affidavit of merits to provide the foundation upon which a finding may be made that there is an issue, whether of fact or law or both, upon which the applicant ought to be heard for a fair and just decision and therefore the judgment in default ought to be set aside.

[8] The obvious point is that, as established in *Buga Singh v Koh Bon Keo* a mistake not demonstrated to have affected the merits of the judgment is not ground for intervention (see as illustration *Muhammad Sanusi Md Nor lwn Sobri Sudin* [2014] 1 LNS 91). A technical non-compliance may be relied

upon as an excuse to win a case but it can never replace the fairness and justice of a decision on the merits. We find affirmation of this view in s 72 of the Courts of Judicature Act 1964 ('Act 91') which provides that 'No judgment or order of the High Court, or of any Judge, shall be reversed or substantially varied on appeal, nor a new trial ordered by the Court of Appeal, on account of any error, defect, or irregularity, whether in the decision or otherwise not affecting the merits or the jurisdiction of the Court'.

[9] Before this court, the submissions for the respondent traversed the law as to setting aside a judgment in default, that the burden of demonstrating there are merits warranting the setting aside the judgment in default. The submissions reproduced the issues as raised in the memorandum of appeal. Assertions were made in the submissions that there were disputed facts. Not only did the submissions fail to demonstrate that the judgment in default had been obtained irregularly, but the respondent failed to produce to the court an affidavit-in-support detailing his defence on merits. There was no statement of defence in the first place. A statement of defence might show what the issue was that needs to be heard. But although the claim was filed in 2011, the respondent had also failed to file a proposed statement in defence. Instead, the respondent's affidavit was only to assert that he had no knowledge of the summons and statement of claim. In brief, the respondent addressed the merits by way of his written submission without establishing a foundation by an affidavit of merits as to why, for the fair and just disposal of the case that the judgment in default be set aside and he be allowed to defend.

[10] Since there was no foundation laid, there was no basis for the High Court to intervene and to set aside the judgment in default otherwise regularly obtained. Accordingly, we allowed the appeal, set aside the order of the High Court, restored the judgment in default, fixed costs in the sum of RM10,000 and ordered that the deposit be refunded to the appellant.

Appeal allowed; order of the High Court set aside with costs of RM10,000.

Reported by Afiq Mohamad Noor